***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

# 75-1237

To be argued by
ELLIOT L. EVANS

B
P/S

## UNITED STATES COURT OF APPEALS

*for the*

## SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC BLITZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

# BRIEF FOR APPELLANT BLITZ

ROONEY & EVANS
Attorneys for Defendant-Appellant Blitz
521 Fifth Avenue
New York, New York 10017

ELLIOT L. EVANS,
PAUL K. ROONEY,
Of Counsel

(4876B)

Van Aken said that when he began to complain and ask

# I N D E X

## AUTHORITIES CITED

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## QUESTIONS PRESENTED

1. Whether a defendant joined in an indictment with fourteen others based upon an alleged single conspiracy is entitled to a new trial as a matter of law where the conspiracy count was dismissed by the trial court and it appears that there was no reasonable basis for the government's pretrial assertion that it would prove the conspiracy charged against that defendant. In any event, is a new trial required under Rule 14 where the defendant has shown actual prejudice accruing from the joint trial?

2. Whether the court's charge to the jury regarding Count 19 improperly included loans within the meaning of the term "compensation" as used in the Investment Company Act of 1940, 15 U.S.C. §80(a) - 17(e)(1), thus requiring reversal of the defendant's conviction on that count.

3. Whether the grand jury procedure in the instant case violated the defendant's due process rights.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1237

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UNITED STATES OF AMERICA,

Appellee,

- v -

ERIC T. BLITZ,

Defendant-Appellant.

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# BRIEF ON BEHALF OF APPELLANT BLITZ

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## Preliminary Statement

Indictment 74 Cr. 1226, containing twenty-five counts, was filed in the United States District Court for the Southern District of New York on December 31, 1974 against defendant Eric T. Blitz and fourteen co-defendants.* In essence, the indictment charged the fifteen defendants with a single conspiracy and substantive crimes of defrauding purchasers of

*This indictment superseded indictment 74 Cr. 798, in 24 counts, which was filed in August 1974 and named 13 defendants.

shares of Elinvest, Inc. ("Elinvest") in violation of 18 U.S.C. §371 (Count 1); 15 U.S.C. §77q(a)(x) (Counts 2-6); 15 U.S.C. §§78j(b)(ff) (Counts 7-13); 18 U.S.C. §1341 (Counts 14-18); and 15 U.S.C. §80a-17(e)(1) (Count 19). Count 20 charged three of the defendants with extortion in violation of 18 U.S.C. 1952, and Counts 21-25 charged two defendants with perjury before the grand jury in violation of 18 U.S.C. 1623. Counts 20-25 were severed prior to trial.

Trial on this indictment began before the Hon. Dudley B. Bonsal, United States District Judge, and a jury on January 27, 1975 against defendant Blitz and co-defendants Drew, Horvat, Orpheus and Rosan and lasted five and a half weeks.* Prior to submitting the case to the jury, the court dismissed the conspiracy count against defendant Blitz. On March 4, 1975 the jury rendered verdicts of guilty on the conspiracy, securities and mail violations against defendants Horvat and Orpheus and on the conspiracy and securities violations against defendant Drew. Defendant Blitz was acquitted of all the securities and mail fraud charges, but was convicted of Count 19 which charged a violation of the Investment Company Act of 1940. Defendant Rosan was acquitted on all counts.

*Two co-defendants, Kadison and Santiago, who were named only in the superseding indictment were granted a severance prior to trial. Five other co-defendants: Gerstenzang, McLeod, Rosenthal, Barry Ross and Van Aken pleaded guilty and testified for the government. The other three co-defendants, Baron, Hill, and Santiago, pleaded guilty prior to trial.

On April 21, 1975 defendant Blitz moved for a new trial on the grounds of improper joinder and various infirmities in the prosecution. On May 29, 1975 that motion was denied without opinion and defendant Blitz was sentenced to a year in jail and a $5,000.00 fine. The sentence was stayed pending this appeal.

## Statement of Facts

### The Government's Case

The government's direct case included over 2,200 pages of testimony from some 30 witnesses along with dozens of exhibits which were introduced in evidence. It was directed at establishing, in intricate detail, the creation, development and implementation of an elaborate conspiracy involving more than twenty people to manipulate the price of Elinvest stock--a conspiracy clearly designed to defraud purchasers of the stock by artificially inflating its price.

#### A. The Conspiracy

The government's main witness was George Van Aken, the central figure in the conspiracy, who testified for nearly

a week (R. 399-983).* A "boy wonder" in the stock market, Van Aken had made hundreds of thousands of dollars in the 1960's through various stock transactions, some legitimate and some illegal. He admitted to participation in seven stock manipulations--including Elinvest--during the late 1960's and early 1970's (R. 596-97).

1. Van Aken's Testimony

Van Aken testified that in October 1970, at the request of co-conspirators Feeney and Rambush, he invested $50,000.00 in a company known as Leisure Time Marine Corporation, the principal asset of which was a large marina on Long Island Sound. In about December 1970, he induced his father-in-law, John Bradley, to also invest approximately $50,000.00 in the marina. Shortly thereafter, Feeney and Rambush had a falling out. Negotiations ensued with the result that on February 11, 1971 Rambush purchased Feeney's shares in Leisure Time and Van Aken agreed to purchase half of Rambush's shares at a later date (R. 402-15).

The conspiracy really began in March 1971 when co-conspirator Raymond D'Onofrio told Van Aken that he had a corporate "shell" named Elinvest which he controlled with a co-con-

*References preceded by "A" refer to the Appendix; "R" to the transcript of the trial; and "GX" and "DX" to government and defense exhibits.

spirator Glenn Woo. D'Onofrio said that since there were very few shares of Elinvest which were publicly held, it would be easy to manipulate the price of the stock and realize a substantial profit. Within a few days, Van Aken met with Woo and discussed the possibility of merging Leisure Time and Elinvest and then manipulating the price of the stock. Van Aken said he told Woo that the possibility sounded interesting and that he would check with his lawyer about it (R. 416-20).

Van Aken then called co-defendant Steven Hill, counsel for Leisure Time, and told him that he wanted to merge Leisure Time into Elinvest. Hill said that he would need a shareholder's list, a financial statement, and a background of the company, all of which Van Aken obtained from Rambush. In early April 1971 Hill told Van Aken that there was a serious problem with the merger because there were too many shareholders to comply with S.E.C. Regulations. As an alternative, he suggested that Elinvest purchase the assets of Leisure Time under Rule 133 which would, in effect, free up all the stock except that held by insiders. Van Aken objected to this because of the difficulties in controlling the proposed manipulation, but Hill said that he could tie up the shares by having all shareholders of Leisure Time sign a "Letter of Investment" thereby precluding their being traded in the open market (R. 424).

Upon hearing of Hill's plan, Glenn Woo objected on the ground that he would not be able to dispose of his 200,000 shares of Elinvest. Hill said that this was not a problem because Woo could sell his shares if he obtained an Opinion Letter from outside counsel. Hill also said he would "free-up" John Bradley's shares as well as his own (R. 427).*

The conspirators then started to leak the news of a possible merger of Leisure Time with Elinvest. Van Aken told Peter Curreri, a member of the Leisure Time Board of Directors, and Frank Rambush, son of Bill Rambush, that they could double their money by investing before the merger. Each bought 500 shares through R. J. Rosan & Co., a registered broker-dealer suggested by Van Aken (R. 443-45). Also during this time, a man named George Reilly told Van Aken that he wanted to sell 55,000 shares of Leisure Time which he had purchased from D'Onofrio and Feeney. Van Aken contacted a friend, Professor Steven Duke of the Yale Law School, who bought these 55,000 shares with money borrowed from Van Aken (R. 439-42).

On April 26, 1971, a stockholders' meeting of Leisure Time was held at which the merger with Elinvest was approved (R. 428-30). The next day defendant Robert J. Rosan, president of the concern that handled the above transactions, and

*John Bradley's shares were subsequently freed up through an Opinion Letter dictated by Van Aken and signed by Judge Philip Rogers, a part-time judge on Long Island (R. 432).

letter to Blitz asking that the money be returned. He said

Van Aken met, and Van Aken told Rosan that he expected Elinvest, then selling at $4.00 to $5.00 per share, to go to $70.00 or $80.00. He said he wanted R. J. Rosan & Co. to handle the expected future trades--thereby earning commissions--and Rosan agreed (R. 447-47a). Shortly thereafter, when Van Aken asked Rosan to handle a transaction for John Bradley, Rosan asked if he could buy some stock directly from Bradley at a reduced price. Van Aken agreed and Rosan subsequently bought 2,000 shares (R. 449-50).

In mid-May, Rosan suggested to Van Aken that M. S. Wein & Co. be brought in as an additional market maker to help raise the price of Elinvest stock. Van Aken agreed and asked Rosan to sell those 2,000 shares to Wein. On May 17, this was done (R. 451-52).

Also in May, Van Aken arranged for George Linder, former president of a small over-the-counter firm, to sell 50,000 Elinvest shares for Professor Duke for a 25% fee which Van Aken advised Duke to pay (R. 489-91).

During that same month, Van Aken had a series of telephone conversations and meetings with defendant Robin Baron, president of Baron & Co., a registered broker-dealer in New Jersey, who told Van Aken that he was also going to handle a block of stock for Duke. Baron told Van Aken that he hoped Van Aken was going to stay in the Elinvest situation for "the long haul" because Baron had some show business customers

to have given Blitz $2,000.00 while he and Blitz were driving

whom he didn't "want to hurt". Van Aken said he told Baron that he was involved in a big way and had a substantial amount of money invested and that he would try to help Baron out with institutional buying (R. 492-93).

By late June, however, Van Aken was apparently dissatisfied with the progress of the manipulation, and arranged a meeting with defendant Orpheus, a broker who had expressed interest in the Elinvest situation, defendant Santini, and Professor Duke at Van Aken's apartment for the purpose of selling some of the Duke stock and of pushing the price up. At the meeting, after some discussion which also involved defendant William McLeod who was telephoned by Orpheus, Duke gave Orpheus 10,000 shares of Elinvest stock to sell.

Also at the meeting, Santini asked Van Aken for the use of Van Aken's apartment for a few days to try to sell the stock. Van Aken agreed and the next day Santini returned to the apartment with defendants Orpheus, Gerstenzang, and a man named Julie Gladstein. Van Aken said that he discussed with this group the effort to move the stock from $4.00 to $8.00 and to get some institutions involved in purchasing it. Orpheus, Gladstein, and Gerstenzang then began making telephone calls from a list of customers and the scheme thereafter turned into a rank boiler-room operation. On July 2, 1971, the group was joined by defendant William Drew (R. 496-500).

had needed about $5,000.00 to hold his [illegible]

Van Aken said that when he began to complain and ask that the men leave his apartment, Drew told him that "Sonny has to use this apartment. He needs it for his boys and you will just have to let him use the apartment...if you get wise you can be pushing up daisies". He said this telephone campaign continued three or four days a week through September (R. 524-28).

Also in late June Van Aken said that he attempted to interest his friend Peter Rosenthal in selling 25,000 shares of Elinvest owned by John Bradley. Rosenthal agreed to sell the stock at $4.00 a share, but demanded one-half of the proceeds, or $50,000.00, for himself, to be placed in escrow --"up front"--with Duke, who had represented both Van Aken and Rosenthal at various times. Van Aken said he told Bradley to get the cash immediately and give it to Duke "as good faith up front money". This was done and Duke agreed to place the $50,000.00 in a safe deposit box and await Van Aken's instructions. Shortly thereafter, Rosenthal told Van Aken that he had two customers, Barrie Morrison and Charles Berlin, to purchase the shares. Van Aken arranged the transaction with Rosan, and when the sales were subsequently completed, Van Aken said he called Duke and told him to deliver the $50,000.00 to Rosenthal (R. 484-87).

By mid-July 1971, Rosan told Van Aken that he was having a hard time moving the price of the stock up to $7.00 or

$8.00 and suggested that Mark and Barry Ross of M. S. Wein & Co. might help. Around July 15, 1971 Van Aken met with Mark Ross who agreed to help to move the price up by pushing the stock in a number of accounts (R. 469).

However, because Van Aken was actually double-dealing Ross, a feud soon arose. Van Aken described a meeting at Neary's Pub in late July at which Barry Ross accused him of "back-dooring" the stock, i.e., selling it behind Ross' back. Although the accusation was true, Van Aken denied it and tried to blame the selling on Woo (R. 474-75). A few days later, Barry Ross called Van Aken again and demanded another meeting at Neary's. Van Aken said that as he was talking to Ross, another man named Frank Bruno--wearing a loud red suit and red tie--came up to them and joined the meeting. Van Aken described what happened:

> "He took over the conversation immediately after he sat down.
>
> He told me that he and his people, and he named a guy named Frank Kadison, who I hadn't heard of, that Mark Scott had bought a substantial amount of shares in the Ross Brothers and that they were losing a lot of money and I am going to have to help him get their money back or at least some of it.
>
> He said that I know that you sold some stock to M. S. Wein for $12,500.00 and something, he wants that money in cash.
>
> I said - I told him initially that I wasn't going to give it to him.

He said if I don't give it to him I am going to get hurt, he is not going to lose this money. So he asked Barry to get up from the table and Barry left and he told me that he wants this cash right away and there is not going to be anything about it and I'd better bring it to him in cash.

* * *

"I got up and met Barry. It was like a telephone booth that is right near there. I told him he had brought a ganster with him. He said well, you owe this guy some money, you better get it to him." (R.476-78)

Van Aken said he then called Rosan and told him that Ross had brought what he considered to be a gangster with him to the meeting. Rosan replied that he had heard that Ross was "connected with some of these Mafia-type guys" (R.479). When Van Aken told Rosan of the demand for $12,500.00 in cash, Rosan told him to pay it and Rosan agreed to cash a check for him. After his wife cashed a check through Rosan the next day, July 27, Van Aken said he again met with Bruno at the Unicorn Restaurant and gave him the $12,500.00 (R. 480-81).

Van Aken also described a large meeting in August 1971 which took place because of another disagreement between what had now become two warring factions within the conspiracy, i.e., the Ross-Bruno group and the Van Aken-Santini group. At this meeting were Bruno, Ross, Kadison, Santini, Viggiano, Orpheus and Van Aken. Van Aken said Bruno told Santini that

Van Aken had "back-doored" them, thereby costing the Bruno group a lot of money. Santini defended Van Aken and attempted to shift the blame to Ross. Van Aken said that Bruno and Santini then "went into the kitchen and started speaking Italian," and the Santini faction--including Van Aken--prevailed (R. 535-36).

The manipulation continued through 1971 with the normal problems in this type of enterprise. For instance, at one point John Bradley had to buy 500 shares of Elinvest from Baron, who was having his problems with the stock (R. 494). In October 1971, Van Aken had his sister buy a small block of Elinvest which had become available and threatened to destroy the market (R. 542).

2. Other Evidence of the Conspiracy.

The government called numerous witnesses to bolster Van Aken's testimony and further describe the workings of the conspiracy. John Bradley testified that Van Aken had suggested that he invest $50,000.00 in Leisure Time stock with the understanding that he would double his investment and that Van Aken would receive any profits over $50,000.00. He said Van Aken never told him that either Leisure Time or Elinvest stock was being manipulated (R. 988-1004).

Peter Rosenthal testified that in early June 1971 he had accepted an invitation from Van Aken to visit the marina, and

Van Aken had attempted to impress him with the merits of the marina as an investment opportunity. A few days later Van Aken asked him to make a market in this stock and offered him 50% of the proceeds of any of the sales that he placed. Despite Van Aken's pressure thereafter, he refused to do so, but did agree to recommend the stock to his customers. He said he told Van Aken that he wanted Professor Duke to act as escrow agent for any monies that he might realize from any sales (R. 107-19).

Rosenthal testified that he later recommended the stock to Charles Berlin and Barrie Morrison who made purchases totaling $100,000.00 through R. J. Rosan & Co. After those transactions, Rosenthal said, he asked Van Aken for his half of the proceeds, or $50,000.00. At a meeting at Neary's Pub, Rosenthal said he met with Duke and Van Aken. Duke told him he had the $50,000.00 in cash and would deliver it to him at the vault of the First National City Bank. The next day, Rosenthal said, he met Duke and received the $50,000.00 in cash (R. 121-28).

George Van Aken's wife Melinda described the transaction with Robert J. Rosan on July 27, 1971 when she accompanied her husband to cash a $12,500.00 check (R. 213-44). Charles Berlin and Barrie Morrison testified to their June 1971 purchase of 25,000 shares of Elinvest for $100,000.00 (R. 245-320). Frank Rambush and Peter Curreri were also called to

describe their purchases of Elinvest in the Spring of 1971 on the recommendation of Van Aken (R. 1114-1159).

Barry Ross said that in mid-July 1971 his brother Mark told him that if they could manipulate up the price of Elinvest stock, Rosan would pay them $12,500.00 in cash. He said he agreed and sold several thousand shares (R. 1195-1210). However, the $12,500.00 was not paid and it appeared to him that Van Aken might be "backdooring" the stock and depressing its value. Therefore, Ross said, he asked defendant Frank Bruno, a hoodlum acquaintance, to come to the meeting with Van Aken at Neary's Pub. There, Ross said, Bruno physically threatened Van Aken and $10,000.00 in cash was paid in short order (R. 1235-39).* He also described the "summit" meeting in August 1971 arranged by the faction headed by Van Aken and Santini and said he brought Bruno and Kadison to the meeting for protection (R. 1239-1249).** He said that after argument by both sides, Santini and Bruno retired to the kitchen where they spoke in Italian. When they returned five minutes later, Santini told him: "You have a guardian angel there, your friend [Bruno]...You should light candles to him. If he wasn't there, I would break both your arms" (R. 1239-48).

*Van Aken testified that he gave Bruno $12,500.00 in cash (R. 481).

**Over strenuous defense objections, Barry Ross identified "mug" shots of both Bruno, a/k/a Bob Turco, and John J. Santiago, a/k/a Sonny Santini (GX. 79 for id.; R. 1228-29; GX. 80 for id.; R. 1222-24).

William McLeod, president of Ridgeway, McLeod & Co., testified to his dealings with the Orpheus-Santini faction of the manipulation (R. 1482-1606). Erwin Gerstenzang testified that, despite the S.E.C.'s revocation of his securities license for fraud in 1967, he agreed to join Orpheus, Santini and Drew to manipulate this stock and recommended it to some of his acquaintances, including Leonore Braunfeld, who was called to testify to her purchase of approximately 100 shares (R. 1607-17). David Kaufman testified that on the recommendation of Robin Baron, he purchased Elinvest through Baron & Co. (R. 1690-1735). Arthur Hale testified to his victimization as a result of his dealings with defendant Gerstenzang (R. 1735-42). Similar testimony was received from Michael Separ, Thomas Nash and Norman Pollisky (R. 1764-1870). Dr. Eugene Craziano testified to his victimization at the hands of Horvat, at the time a salesman for Baron & Co. (R. 1904-14).

Ned Levitt, Special S.E.C. Attorney assigned to the New York Strike Force Against Organized Crime (who had been sitting at government counsel table), described--over defense objections--interviews he conducted with Pollisky and Gerstenzang, each of whom claimed that Drew threatened him with physical harm if he did not buy Elinvest stock. Specifically, Levitt testified that Pollisky told him that during a conversation with Drew, Drew told Pollisky: "You buy the stock or I will come up there and break your legs." (R. 1874, 1915).

Dean Willeford, who was a general partner for Newport Associates, an investment company in Laguna Beach, California, said that in late June at a meeting in California Don Viggione promised him a 10% profit within a few weeks if he purchased Elinvest. A few days later he received telephone calls from Van Aken, Santini and Orpheus, all of whom urged him to purchase Elinvest.* After researching the stock, Willeford purchased 1,000 shares for his own account and 1,000 shares for Newport Associates (R. 1925-2042).

Matthew L. Patterson testified that he purchased Elinvest on the recommendation of Baron & Co. (R. 2043-65). Archibald Denny testified that he purchased Elinvest on the recommendation of Peter Horvat (R. 2066-2079).

George Appoldt, presently a Compliance Examiner with the S.E.C., testified that he was a cashier for Baron & Co. between 1969 and 1971. He identified various documents from Baron & Co., testified about defendant Horvat, and pointed out that Baron & Co. had gone into trusteeship in November 1971 (R. 2081-2132).

John R. Steinert, an S.E.C. investigator, identified various schedules concerning Baron & Co. and payments to

*He said that although Santini suggested in a call on July 1, 1971 that he could verify information on Elinvest through an "Eric Bliss" in Tacoma, Washington, he never called Blitz. (GX. 59E; R. 1962, 1975)

defendant Horvat (R. 2132-2200).

B. The Case Against Defendant Blitz

Defendant Eric Blitz, a portfolio manager for the Astron Mutual Fund and Bond Stock Mutal Fund in Tacoma, Washington, was one of the people Van Aken contacted in his efforts to manipulate the Elinvest stock. Van Aken testified that in late May or early June 1971, he telephoned Blitz in Tacoma, Washington and told him that his father-in-law, John Bradley, had a large block of stock in Elinvest that he wished to sell. He said Blitz asked several questions about the company--what it did, what its sales were, what its earnings were--and indicated that the company appeared too small for the Fund. Van Aken also claimed that he told Blitz that if Blitz would purchase the stock, Van Aken "could make as much as $25,000.00 available" (R. 454).

Several days later, Van Aken had another long distance telephone call with Blitz. Van Aken said that Blitz asked if "the $25,000.00 was still there" because he needed the money for his brother who had "a run-in with the law and needed it for legal fees, whatever else he needed it for". Van Aken said he told him it was, whereupon Blitz agreed to buy 25,000 shares for the Astron Fund. Van Aken said he would contact Rosan to handle the transaction. He said Blitz asked when he might receive the $25,000.00 and that he replied that it would be after the settlement date (R. 455-56).

Van Aken said he called Rosan on June 9 and arranged the transaction. Rosan told Van Aken that once he confirmed the order with Blitz, he would purchase Bradley's stock for his own account and then sell it to the Astron Fund so that he could charge a commission. On June 10th, at Rosan's request, Van Aken asked Blitz to buy another 2,000 shares of Elinvest. When Blitz asked why, Van Aken lied, and said that it was to help lighten the position of one of the market makers.*

Several days later--around June 18--Van Aken said he received a telephone call from Blitz who was in New York City and wanted to pick up the $25,000.00. Van Aken said he told Blitz that he would get a check from Bradley and meet him at the Unicorn Restaurant. He said he then obtained a check for $25,000.00 from Bradley (A. 70; GX. 15) and went to the Unicorn Restaurant where he gave Blitz what he believed was a post-dated check. According to Van Aken, there was no conversation of substance, the meeting was short, and there was no discussion about any loan (R. 459-62).

In March 1972, Van Aken said, Bradley told him he had received a letter from his accountant, Milton Hoffman, asking him to file a Form 1099 with respect to the payment to Blitz.

*The real reason was to show some progress in the shares which had been purchased by M. S. Wein from Rosan (R. 458).

Van Aken said he told Hoffman that if a Form 1099 was filed, he and Blitz could get into trouble because the fee was illegal. Hoffman replied that the $25,000.00 could be written off as an uncollectible loan, and suggested sending a letter to Blitz saying that Bradley wanted to collect the outstanding loan. This was subsequently done.

Van Aken also telephoned Blitz in Tacoma, told him that he had a serious problem over the $25,000.00, and said that either Bradley would have to file a Form 1099 or Blitz would have to return the money. Van Aken added that he was concerned about an S.E.C. investigation of Elinvest. He said Blitz refused to repay the money and that he told Blitz that Bradley was going to send a letter demanding payment anyway (A. 71; GXs. 19a, 19b, 19c; R. 547-49).

Although Van Aken continually claimed that the $25,000.00 was never considered a loan, John Bradley did in fact deduct this $25,000.00 payment to Blitz as an uncollectible loan on his 1971 income tax return (A. 71; GX. 20; R. 555). Moreover, Van Aken conceded that he tried to contact Blitz three or four times in May and June 1972 in an effort to recover the money, even though it had <u>already</u> been deducted by Bradley. Blitz, however, refused to accept his calls, and thus, in June he asked their mutual friend, Peter Rosenthal, to contact Blitz about repayment of the money. A short time later, Rosenthal told Van Aken that Blitz had agreed to send Bradley

a check for $26,750.00. A check for $26,750.00 was in fact sent by Blitz but not until August. The check was dated August 11, 1972 and was accompanied by a letter from Blitz to Bradley thanking him for the loan. (A. 73, 74; DX. B, GX. 21-a; R. 560-64).

Van Aken testified to two other alleged pay-offs to Blitz. In June 1970, he said, he paid Blitz approximately $10,000.00--in cash--in connection with the purchase of "On-Site Energy" stock through the Astron Fund, and in November 1970, he claimed to have paid Blitz $7,500.00--also in cash--for the purchase of "Cut-Up Capers" stock by the Astron Fund (R. 577-79).

Van Aken also testified that to his knowledge Blitz did not know the other defendants in the case or anything about various manipulations, including Elinvest (R. 660-63, 605-06).

John Bradley testified that at Van Aken's request he had written a check as a "commission fee" to Blitz around June 18, 1971. He said that at the time he did not know what Blitz' position was and did not recall any conversations with him (R. 1005-08).

Bradley said that in March 1972 his accountant, Milton Hoffman, became concerned about submitting a Form 1099 regarding the Blitz payment and had suggested that he write a

letter to Blitz asking that the money be returned. He said Van Aken dictated the letter and he signed it. He said that he never spoke to Blitz about the $25,000.00 check and that he only read the letter causally (A. 71; GX. 19b; R. 1009-12). Bradley said that in August 1972 he received a check from Blitz in the sum of $26,750.00 together with a personal note.* He said that although there was never any formal note evidencing the $25,000.00 as a loan, he did in fact deduct it as a non-collectible loan on his 1971 income tax return (A. 72; GXs. 19b, 20, 21a; DX B; R. 1008-18, 1050).

Peter Rosenthal, who had met Blitz five years earlier, said that he telephoned Blitz three times in June 1972 at the request of Van Aken and urged him to call Van Aken about the $25,000.00 (R. 129-33).

Rosenthal also testified that he had given Blitz money on three occasions. The first was a loan of $20,000.00 which he made to Blitz in 1969 which was repaid with interest within a few months (R. 138).

The second was in June of 1971 when Rosenthal claimed

*Curiously, when asked on cross-examination what he did with Blitz' repayment of $26,750.00, Bradley replied: "...during the course of the year, George [Van Aken] had owed me money on another loan, and actually it was my money at that time." [Emphasis added.] (R. 1063).

neous and requires reversal of his conviction on Count 19

to have given Blitz $2,000.00 while he and Blitz were driving upstate to see a company called National Modular Systems in Monsey, New York. During the ride, he said, Blitz told him that his brother was having financial difficulty. Upon hearing this, Rosenthal claimed he handed Blitz $2,000.00--in cash (R. 140-41).

The third occasion occurred in August 1971 when, Rosenthal claimed, Blitz received $10,000.00, also in cash, for purchasing "American Community Systems" stock through Greenman & Co. Rosenthal said he gave $5,000.00 to Bryan Greenman, the president of Greenman & Co., with the understanding that Greenman would add another $5,000.00 and mail $10,000.00 in cash to Blitz in Tacoma, Washington. He also claimed that Blitz--during a later telephone conversation--admitted receiving that money, in cash, in the mail (R. 143-44).

Eleanor Palmer, vice-president and treasurer of the Frank Russell Co., aside from describing Blitz' function as portfolio manager and identifying various documents showing purchases by the Astron Fund, testified to a conversation with Blitz in March of 1973. In that conversation, Blitz told Mrs. Palmer that he had received a grand jury subpeona to testify about the Elinvest transaction. She said that Blitz said that he had borrowed $25,000.00 from some people involved with Elinvest, but had paid it back with interest, and showed her a check in the amount of $26,750.00. He told her that he

had needed about $5,000.00 to help his brother, but had borrowed more than that to invest in securities. She also said Blitz told her he didn't go to George Russell, the president of the company, because he didn't want to tell him about his brother's pending incarceration. Mrs. Palmer said she asked Blitz if he had reported this loan to the New York Stock Exchange, and Blitz replied that he did not and did not think that he had to (R. 376-82, 385).

George Russell testified that he had hired Blitz in 1968 and that in 1971 Blitz was vice-president and portfolio manater of the Astron and Bond Stock Funds. Mr. Russell said that on March 25, 1973 Blitz told him that he was going to New York to testify before the grand jury about a stock named Elinvest which he had purchased for the Astron Fund on the recommendation of Van Aken. He told Russell that he had met Van Aken through Rosenthal and that Van Aken had tried to persuade Blitz that Elinvest was a good stock with a lot of potential. Blitz said that he had originally postponed an investment because of the low value of the stock but that some time later Van Aken telephoned and said that the stock was selling at about $5.00 a share and that a block was available at R. J. Rosan & Co. Blitz told Russell that he had checked further and verified Van Aken's story. According to Russell, Blitz said that about this time during a visit to Van Aken's home on Long Island, he discussed his brother's problem with Van

Aken and his father-in-law. Blitz said that he hade made known his need for $25,000.00 and that Van Aken offered to loan it to him. Blitz said that he felt that this might be construed as a conflict of interest, whereupon Van Aken said that his father-in-law could lend Blitz the money (R. 1454-59).

Mr. Russell said he again discussed the Elinvest situation with Blitz after his return from New York, six days later, and that Blitz told him that the grand jury investigation concerned a possible stock manipulation of Elinvest and the involvement of "Mafia-type characters". Russell said that at this meeting, Blitz said that of the $25,000.00 he had used about $5,000.00 for his brother and invested the remaining $20,000.00 in his own account. Blitz said that he had a cancelled check showing repayment with 7% interest. When Russell asked Blitz why he had failed to report this loan to the New York Stock Exchange, Blitz replied that he had forgotten to do so (R. 1460-65).

Blitz' Defense

Defendant Eric Blitz testified on his own behalf. He adamantly denied Van Aken's claim that he received a pay-off in connection with his purchase of Elinvest stock for the Astron Fund, and said that the $25,000.00 check he received was, quite simply, a bona fide loan.

A thirty-four year old resident of Tacoma, Washington, defendant Blitz is married with three children. Following his graduation from Stanford University and Stanford University Business School in 1963, he was employed by several investment and securities companies until 1968 when he became portfolio manager of two Frank Russell Co. mutual funds, the Astron Fund (a speculative fund) and the Bond Stock Fund (a growth fund). He is now employed by Parametrix, Inc., a company engaged in engineering and environmental consultanting in Sumner, Washington (R. 2256-66).

Blitz testified that he first met Van Aken in late 1968 or early 1969, became somewhat friendly with him, and spoke to him perhaps ten times a year regarding suggestions for purchases of stock (R. 2277-79). He said that in a telephone conversation in April 1971 Van Aken told him about the marina and his plans for it, which included making it a public corporation. In early May in another telephone call Van Aken said that the marina had been merged into Elinvest and that "things were going great". In late May, Blitz said, Van Aken telephoned again and said that he was "going to close in a couple of weeks" and that the Astron Fund ought to invest in Elinvest. Blitz replied that it sounded interesting but he wanted to check out the stock before purchasing and would speak to Van Aken about the marina during a scheduled business trip to New York City in early June. Blitz said that after

checking with Peter Rosenthal and looking at the "pink sheets", he was inclined to purchase the stock, based partially on the fact that Van Aken--who he knew to be extremely successful--was taking over the company (R. 2295-97, 2451).

In early June Blitz came to New York City for a week-long (Sunday, June 6, to Friday, June 11, 1971) series of meetings with the staff of the Frank Russell Company in its Manhattan office, with research analysts at Lehman Brothers, Oppenheimer & Co., Smith Barney and C. J. Lawrence, and a visit with Peter Rosenthal to the plant of National Modular Systems in Monsey, New York. On June 8 he met Van Aken at the Unicorn Restaurant. Blitz said they discussed the general market conditions and Van Aken described the possibilities of the marina and showed him a financial statement of Leisure Time/Elinvest. The next day he instructed his office in Tacoma to order 25,000 shares through R. J. Rosan & Co. Blitz also said that Van Aken called him the following day and asked him to purchase 2,000 additional shares and he agreed. He returned to Tacoma on Friday, June 11, following a trip that day with Peter Rosenthal to the National Modular Systems plant in Monsey, New York.

On Sunday, June 13, Blitz said, he received a telephone call from his brother who told him that he and his family were being threatened because of his failure to repay

$20,000.00 which he owed to his confederates in an aborted marihuana transaction. The brother added that he had to surrender and begin his five year jail sentence on June 21 and was in the meantime going to move his wife and children out of their home. Blitz told his brother that he wanted to help but was $43,000.00 in debt to his local bank in Tacoma (R. 2316-17).

The following day, June 14, Van Aken telephoned and wanted to know if "...everything had gone all right with the trade?" In their conversation Blitz mentioned his brother's problems. Van Aken offered to lend $25,000.00 to help him out. Blitz said he refused that offer, believing that borrowing money from Van Aken might be considered a conflict of interest in view of Van Aken's position with Elinvest. Van Aken then suggested that his father-in-law, John Bradley, who had no position in Elinvest would be willing to lend Blitz the money, thereby eliminating any potential conflict. Blitz said that he agreed to accept the loan on that basis. A few days later, Blitz said, he received the $25,000.00 check from John Bradley in the mail. He specifically denied the government's contention that this check was handed to him by Van Aken "during the week of June 16-22" and said that he was in Tacoma--as proved by his records (DX.J)--during this entire time (R. 2314-25, 2415, 2466).

Blitz admitted that he did not need the full $25,000.00 for his brother, but said that he took that amount hoping to invest it and make enough to be able to give his brother $5,000.00 and return the $25,000.00 to Van Aken with interest. Blitz testified that after receiving the check, he sent a personal note to either Van Aken or Bradley thanking them for the loan and indicating that he would repay it in six months with 7% interest. He did not keep a copy of this note (R. 2325-26).

During 1971 and 1972 Blitz said he gave a total of about $5,000.00 to his brother's family and that the remainder was invested in the market. Unfortunately, the market was extremely depressed during that time and Blitz lost a large portion of his investment (R. 2326).

In December 1971 Blitz said that Van Aken telephoned him and said that although the price of Elinvest had gone down, it was still a good investment and might merge with Didco, Inc., a company that owned land in Seattle, Washington. Van Aken asked Blitz to investigate this land. In so doing, Blitz discovered that Didco had been buying up land in Washington at inflated prices using offshore money, and thus, suggested to Gene Holen, then manager of the Astron Fund, to sell Elinvest. This was done--at a considerable loss--on December 23, 1971 and January 18, 1972. Shortly thereafter, Blitz said, Van Aken--extremely disturbed by the fund's sale of the stock--

telephoned him and demanded that Blitz immediately pay back the $25,000.00 loan. However, because of his poor investment situation, Blitz told Van Aken that he did not have the money to pay back at that time. He said that around mid-February, he received another telephone call from Van Aken saying that Bradley needed the money to pay his income taxes but he once again told Van Aken that he did not have the money (R. 2334-36).

In March, Blitz said, he got a letter from John Bradley demanding payment of the loan (A. 71; GX. 19b), but that he did not repsond to the letter because he still simply did not have the money. Thereafter, he said, he received a number of telephone calls from Van Aken, including one at 5:00 A.M., after which he refused to take any further calls from Van Aken (R. 2337-40).

In late May or early June 1972, Blitz received a telephone call from Peter Rosenthal urging him to repay the money. By August, Blitz said, he had made some money in the market and was in a position to repay the $25,000.00 loan with interest as agreed. He confirmed that he sent Bradley a check in the amount of $26,750.00 with a note in August 1972 and said that he reported the payment of this interest on his 1972 tax return (A. 72; DXs. B, K; R. 2341).

Blitz confirmed that he had spoken with Eleanor Palmer in March 1973 after receving a grand jury subpeona from the Federal Strike Force in Manhattan, and essentially confirmed Mrs. Palmer's testimony concerning that conversation. Blitz also said that he spoke with George Russell on March 25 and March 31, 1973, and largely confirmed Russell's testimony about those two conversations. Blitz, however, said that he did not tell Russell that he had picked up the $25,000.00 at Van Aken's home (which was not true) (R. 2342-55, 2419-21).

Blitz admitted that he borrowed $20,000.00 from Peter Rosenthal in late 1969 and that he had repaid this sum a few months later in early 1970 (R. 2276-77). He categorically denied, however, ever accepting any money from either Van Aken or Rosenthal in connection with his purchase of any stock for the Astron Fund and claimed that his records proved that he could not have been in New York at the times testified to by Van Aken (DXs. H, I; R. 2288-94, 2314, 2328-30, 2398).

Blitz said that he had not reported the Bradley loan to the New York Stock Exchange because at the time he received the money the Frank Russell Co. was not a member of the exchange. When it did become a member in about September 1971, Blitz said he did not think that this informal type of loan had to be reported. He also said that in his conversations with George Russell, he had somewhat toned down the entire transaction because Russell was his superior, and he was

hoping the whole matter would go away (R. 2326, 2331-32, 2417-23).

Blitz said he knew none of the defendants in the case, other than Van Aken and Rosenthal (R. 2347-49), and was not aware of the manipulation of the Elinvest stock (R. 2294, 2347-49, 2440-41).

Motions for Severance

Prior to trial, defense counsel initially requested that the government voluntarily sever Blitz' case on the ground that he could not have been a member of the alleged conspiracy to manipulate the Elinvest stock. Although the government had consented to a severance in a prior similar case in which Blitz was acquitted after a three day trial,* it refused to do so here. Thus, on December 19, 1974, Blitz moved for a severance contending that the only "real" charge against him was Count 19, that he knew none of the alleged conspirators except Van Aken and Rosenthal, and that the $25,000.00 check he received from Bradley was a bona fide loan (A. 41-46).

After the government obtained the superseding indictment herein, Blitz filed a supplemental affidavit in support of his pending motion for severance (A. 47-49). He reminded the court that Van Aken had previously testified that Blitz had

*United States v. Deutsch, et al., 73 Cr. 1083 (the "Acrite" case).

no knowledge of any manipulation in which Van Aken participated (A. 48). Although the government did not file a written response to the severance motion, at a pre-trial conference on January 9, 1975, the court denied the motion based upon the government's representation that Blitz was a member of the conspiracy (A. 53-54).

This motion was continually renewed--without success--during the trial, specifically after the government's opening statement (R. 38), during Van Aken's testimony (R. 571), at at the conclusion of the government's case (A. 55-67; R. 2219), and prior to the submission of the case to the jury (A. 68-69; R. 3296, 3334-35). It was also renewed in a Motion for a New Trial, filed on April 10, 1975, which was denied without opinion on May 29, 1975 at Blitz' sentencing (A. 143-146).

## ARGUMENT

### POINT ONE

### DEFENDANT BLITZ' CONVICTION SHOULD BE REVERSED BECAUSE HIS JOINDER IN THIS INDICTMENT WAS IMPROPER AND HIGHLY PREJUDICIAL.

The instant indictment, originally returned in August 1974 but superseded in December 1974, charged defendant Blitz and fourteen co-defendants with participation in a single conspiracy to manipulate Elinvest stock, as well as substantive offenses in connection therewith. As is so frequently the case, the conspiracy count was the sole basis for joinder of defendant Blitz in this multi-defendant indictment.

Prior to trial, defendant Blitz moved for a severance on both the superseded (74 Cr. 798) and superseding (74 Cr. 1226) indictments on the ground that he had no part in, or knowledge of, the conspiracy alleged in the indictment, and no connection whatever with any of the other defendants named therein except Van Aken and Rosenthal, both of whom were to be government witnesses (A. 44, 48). This severance motion was supported by testimony at a previous trial before the same court in June 1974, in which defendant Blitz had been acquitted of a charge of accepting a pay-off from George Van Aken in connection with the purchase of another stock, named "Acrite", for the Astron Fund--a charge strikingly similar to that in-

volved here. Prior to that trial, Blitz had also sought, and--upon the government's consent--obtained, a separate trial (which took three days) from six co-defendants with whom he had originally been indicted.

At the Acrite trial, the government's principal witness, George Van Aken, had testified unequivocally that Blitz had no knowledge of the manipulation of Acrite stock or --significantly--of any other manipulation of which Van Aken had knowledge. In response to a question by the court, Van Aken testified:

> "The COURT: Did he know about any manipulations where you knew about the manipulations?
>
> The WITNESS: No, sir." (A. 49).

Since Van Aken was also to be the government's main witness in this case--indeed the only witness with first hand knowledge of the Blitz transaction--it was somewhat surprising that the government here, unlike Acrite, strenuously opposed Blitz' severance motion. At oral argument on the motion, the Assistant United States Attorney assured the Court that the government would prove by "ar ble evidence" that Blitz was a member of the conspiracy and, based upon this representation, the severance motion was denied (A. 54).

Defendant Blitz was thus required to go to trial with four defendants whom he did not know, and to endure the ordeal

and expense of a five-week trial rather than one which would have lasted only a few days had he been tried alone. Moreover, aside from this inherent prejudice, the joint trial was extremely prejudicial legally, and may well have been the cause of his conviction of Count 19 rather than an outright acquittal.

The government's pre-trial representation to the court, was, in fact, wholly unjustified, as demonstrated by the court's dismissal of the conspiracy charge against defendant Blitz prior to submission of the case to the jury. Since Van Aken again testified--as he had before--that Blitz had no knowledge of the Elinvest manipulation, and since the government offered no other evidence of Blitz' membership in the conspiracy, the dismissal of the conspiracy count was clearly warranted, if not inevitable.

However, even after dismissing the conspiracy count, the court refused Blitz' renewed motion for a severance which was based upon the then clear misjoinder under Rule 8(b), and upon the prejudice which had accrued from the mass of evidence, irrelevant to defendant Blitz, which had come in with no cautionary instructions on the conspiracy charge.

It is respectfully submitted that since Blitz' joinder in the indictment was--from the outset--improper, denial of his severance motions before, during, and after trial was erro-

neous and requires reversal of his conviction on Count 19.

A. The joinder was improper as a matter of law.

Rule 8(b), F.R. Crim. P., provides that defendants may be joined together in a single indictment only if they are "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Under this rule, it is generally permissible to join defendants in a single indictment if they are alleged to have acted in concert, and a charge of a single conspiracy is normally sufficient to permit such joinder. However, this Court has long recognized that allegations of a single conspiracy in an indictment must be made in good faith and with a "reasonable expectation that sufficient proof (of the allegations justifying the joinder) would be forthcoming at trial." United States v. Aiken, 373 F.2d 294, 299 (2d Cir.), cert. denied, 389 U.S. 833 (1967); Stern v. United States, 409 F.2d 819, 820 (2d Cir. 1969). Where there is--or could be--no such reasonable expectation, the initial joinder is improper, and a new trial is required under Rule 8(b) even without a showing of actual prejudice.

The courts are, perhaps understandably, reluctant to find that initial allegations in the indictment were not made in good faith, and, as noted, all that is required is a "reasonable expectation". However, in view of Van Aken's

prior testimony and the total absence of any other proof on this point, it is difficult to discern any reasonable basis for the government's claimed expectation that it would prove that defendant Blitz was a member of the alleged conspiracy. Notwithstanding any subjective "hope" which may have been fostered by the prosecution, there was simply no objective basis for the expectation that the conspiracy count would be proven at trial. Under these circumstances, the fact of the improper joinder itself requires a new trial. See United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971); Metheany v. United States, 365 F.2d 90, 95 (9th Cir. 1966). In Donaway, the court noted that the decisions holding that a conspiracy count can be a sufficient link to justify the joinder of defendants:

> "...do not permit the Government to avoid the requirement of Rule 8(b) merely by adding a conspiracy count in order to link all defendants. Linking can be allowed, to uphold joinder, only where the conspiracy charge was put forth in good faith." [Emphasis added.]

See also United States v. Manfredi, 275 F.2d 588, 593 (2d Cir.), cert. denied, 363 U.S. 828 (1960).

As this Court indicated in United States v. Branker, 395 F. 2d 881 (2d Cir. 1968), the government has a responsibility--both to defendants and to the court--to fairly assess its chances of proving a conspiracy which provides justification for joinder. In Branker, the court found it necessary

to grant new trials after dismissal of a conspiracy count, and, in so doing, said:

> "It is regrettable that the trial court had to confront substantial motions for severances after five weeks of trial. Since the testimony of Mrs. Neeley provided no surprises, counsel for the government must surely have known in advance of trial that the chances of proving the conspiracy charged in the indictment were very slim. Yet the conspiracy count provided the only justification for the joinder of the eight defendants. If the prejudice of joint trial is to be eliminated without the waste of time and energy which results from a joinder which is declared improper in the midst of trial, or, as here, on appeal, we must rely on the responsibility and good judgment of the prosecutors." 395 F.2d at 889.

See also United States v. Agueci, 310 F.2d 817, 840-41 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963).

It is respectfully submitted that here, as in Branker, the government simply did not fairly assess its chances of proving the conspiracy as to defendant Blitz. Here, as in Branker, the testimony of the government's principal witness, George Van Aken, provided no surprises, and no other evidence was offered to prove Blitz' membership in the conspiracy. Surely the government must have known that, as in Branker, its "chances of proving the conspiracy charged in the indictment were indeed slim". To permit the government to act in this fashion merely to avoid a two-or-three day trial, or, perhaps more importantly, to improve its chances of conviction, is both improper and unfair. It is respectfully submitted

that the government must be required to suffer the consequences of this type of conduct, and that a new, separate trial should therefore be ordered.

It should also be noted that the error here was not precisely the same as that normally involved in drug cases where an indictment charges a single conspiracy but the proof more reasonably shows several conspiracies with a common link. See, e. g., United States v. Sperling, 506 F.2d 1323, 1340 (2d Cir. 1974), in which this Court warned the government against its all-too-common practice of routinely joining numerous defendants in single indictments and attempting to force them all to trial together on a single conspiracy charge. Here, there was ample evidence of a single conspiracy to manipulate the Elinvest stock involving virtually all of the other defendants; defendant Blitz, however, was simply not a member of that conspiracy. Because of this distinction, it should not be necessary to make a determination of whether there was any "actual" prejudice. There was no basis for Blitz' joinder from the outset, and a new trial is therefore required.

B. The joint trial was in fact prejudicial.

Even if this Court were to hold, however, that a new trial would be warranted only on a showing of actual prejudice, it is submitted that such prejudice was manifestly present at

the trial. In the first place, the length of the trial alone was prejudicial, since the jury was required to sift out about two or three days of testimony relating to Blitz which was disjointedly scattered throughout five-and-one half weeks of trial.

An enormous quantum of evidence was quite properly introduced on the conspiracy charge, none of which pertained to defendant Blitz, and--since Blitz was alleged to have been a member of the conspiracy--no cautionary instructions were given to the jury concerning this evidence. In fact, of the twenty-nine witnesses who testified on the government's direct case, only six offered <u>any</u> testimony about Blitz, and only one, Van Aken, testified to the alleged pay-off in violation of the Investment Company Act of 1940. Of those six witnesses, only about 300 pages of testimony related to Blitz, out of a total of the more than 2,200 pages which comprised the government's direct case.

The following is a summary of the evidence against Blitz:

| Witness | Transcript | Re Blitz | Cross Examination | Total Case | Total Blitz |
|---|---|---|---|---|---|
| Peter Rosenthal | R.107-211 | R.129-47 | R.151-73<br>R.1556-64 | 104 | 48 |
| Eleanor Palmer | R.338-98 | All | | 60 | 60 |
| George Van Aken | R.399-983 | R.453-63<br>R.543-67<br>R.576-80 | R.602-68 | 584 | 104 |
| John Bradley | R.984-1112 | R.1005-22 | R.1023-65a | 128 | 60 |
| George Russell | R.1453-81 | All | | 28 | 28 |
| Dean Willeford | R.1925-2042 | R.1941-42<br>R.1961-62 | R.1975-79 | 117 | 6 |
| | | | | | 306 |

In mere quantitative terms, then, the jury could not have been expected to accurately weigh and assess the evidence against defendant Blitz separately from the mass of evidence it heard which was irrelevant. See, e.g., United States v. Donaway, supra, where in a similar situation the court stated, "We find it impossible to conclude on the facts here that appellant was not severely prejudiced by the evidence relevant only to the co-defendants," and held that the failure to grant a severance was an abuse of the trial court's discretion.

Moreover, the qualitative nature of the irrelevant testimony which was introduced at the trial was highly prejudicial. The jury was presented with a vivid picture of a sophisticated group of corrupt, greedy men carrying on a complex scheme to manipulate and defraud--a scheme replete with conniving, dirty-dealing, and overtones of mobsterism. The government deliberately elicited highly-charged testimony from Van Aken and others about the details of the conspiracy involving prominent people like Professor Duke of Yale Law School, charges and innuendos of Mafia connections, underhanded schemes, threats of violence, and strong-arm tactics used by various defendants and co-conspirators.

Nor was this picture painted in subtle colors; on the contrary, the government went to great lengths to emphasize the sensational and melodramatic aspects of the case, none of which related to Blitz. For example, when Barry Ross was called to testify and told of his involvements with Frank Bruno and Sonny Santini, the prosecutor--for some inexplicable reason--asked Ross to identify mug shots of these two gangsters (GXs 79 and 80 for id.; R. 1222-24; 1228-29). Though not introduced into evidence, these pictures were displayed within view of the jury which the trial court later characterized as "unfortunate". Blitz, of course, did not know Bruno, Santini or Ross.

Ross also described the big "sit-down" between the

Santini and Bruno factions of the manipulation and Santini's statement that if it weren't for Bruno, he would have broken both of Ross' arms (R. 1248). Van Aken described--again in vivid detail--his meeting at Neary's with Ross and Bruno where Bruno threatened Van Aken and demanded $12,500.00 which was paid in short order. He also told of his efforts to get Santini's men out of his apartment in the Summer of 1971 and Drew's warning that if he "got wise", he might soon find himself "pushing up daisies".

Perhaps the best example of the government's approach was in the testimony of Ned Levitt, Special Strike Force Attorney who had been sitting at government counsel table and who was called on the government's direct case to bolster previous testimony by defendant Gerstenzang and Pollisky. Aside from the fact that Levitt's testimony was of highly questionable admissibility and strained the limits of propriety (United States v. Torres, 503 F.2d 1120, 1126 (2d Cir. 1974); United States v. Alu, 246 F.2d 29, 33-34 (2d Cir. 1957)), this evidence of threats by defendant Drew--coming from the lips of a government attorney--was surely prejudicial to defendant Blitz who was not involved in the conspiracy and who knew neither Drew, Gerstenzang nor Pollisky.

This kind of testimony--unlike some stock fraud cases--was not merely irrelevant to the case against Blitz but was so highly inflammatory and so permeated the trial that it must

necessarily have affected and infected the jury's ability to make a fair and impartial determination of Blitz' guilt or innocence.

It is no answer to say that Blitz was acquitted of the other charges, since it is futile to attempt to accurately assess why a jury makes particular determinations. The effect of all this irrelevant and emotional evidence was to deny Blitz a fair determination of the single valid issue which related to him, viz. whether Van Aken or Blitz was telling the truth about the purpose of the payment which Blitz admittedly received from John Bradley and which he admittedly repaid with interest. This relatively simple matter of credibility has been the sole genuine issue since the inception of the government's prosecution against Blitz in March 1973. It was so in the Acrite case, and it was here. Evidence of threats, of violence, of gangsterism, and of Organized Crime had nothing to do with this issue, and would clearly not have been admissible at a separate trial. For the government to have obtained a conviction against Blitz by means of a joint trial in which it was permitted to introduce this kind of evidence was both unfair and wholly unnecessary. Here, as in United States v. Butler, 494 F.2d 1246, 1257 (10th Cir. 1974), "the possibility that the issue of his guilt was confused with the guilt of other defendants involved in unrelated transactions, at different times and in different places is too

great." Here, as in Butler, the defendant's conviction must therefore be reversed and a new trial ordered.

In United States v. Miley, 513 F.2d 1191, 1209-10 (2d Cir. 1975), this Court was recently again confronted with claims of improper joinder in a narcotics conspiracy, and again dealt with what it characterized as "the consequences of the Government's ill-advised practice of attempting to obtain in a single trial convictions of numerous defendants who are only loosely connected in a criminal enterprise." The case is particularly apposite to the instant situation in that there had been a previous mistrial which informed both the government and the court what the evidence would be at the second trial. (Here, of course, the government had Van Aken's prior testimony in Acrite.)

After a lengthy review of the evidence, this Court in Miley concluded that although the government had elicited sufficient evidence to support two separate conspiracies, it had failed to link them together into a single conspiracy.*

*In a footnote, the Court referred to its previous warning to the government, announced on October 10, 1974 in United States v. Sperling, supra, that it might be risking reversal of convictions by continuing to obtain indictments which improperly charged single conspiracies in order to justify joinder, but noted that that warning was issued after the Miley indictment was returned and after the trial was held. The instant superseding indictment was returned in December 1974 and the trial did not begin until January 27, 1975, nearly four months after Sperling. Obviously, the government had ample opportunity to consent to a severance of Blitz' case had it chosen to do so.

Although holding that several of the defendant's severance motions should have been granted, the Court refused to reverse the convictions only because it found no possible prejudice which accrued from the improper joinder:

> "...since we have been unable to discern any prejudice from the joinder, we are unwilling to reverse because of denial of the motions for severance, as we surely would under the circumstances of this case if any prejudice had been shown." 513 F.2d at 1210 (Emphasis added.)

The situation here is strikingly similar to that in Miley, except that here prejudice has clearly been shown. Moreover, the issue here is not merely whether there was one conspiracy or two; the issue is whether this one defendant--who knew nothing about the manipulation and who knew none of the defendants except two of the government's own witnesses--received a fair trial.

It is respectfully submitted that the time has come to do more than issue pious warnings to the government in cases like this, and that under the circumstances here present defendant Blitz should--indeed, must--be given a new, separate trial at which his guilt or innocence can be fairly and impartially determined.

## POINT TWO

### DEFENDANT BLITZ' CONVICTION SHOULD BE REVERSED BECAUSE THE COURT'S INSTRUCTION TO THE JURY REGARDING THE ELEMENTS NECESSARY FOR CONVICTION WAS ERRONEOUS.

The only charge of which defendant Blitz was found guilty was an alleged violation of the Investment Company Act of 1940, 15 U.S.C. §80a - 17e(1). This statute makes it unlawful for "any affiliated person of a registered investment company...to accept from any source any compensation (other than a regular salary or wages from such registered company) for the purchase or sale of any property to or for such registered company or any controlled company thereof, except in the course of such person's business as an underwriter or broker." (Emphasis added.)

Since it was not disputed that defendant Blitz accepted a check for $25,000.00 from John Bradley, the only conflict at trial concerned the purpose of the payment. Van Aken claimed that the money was given as an outright pay-off, which he did not expect returned. Blitz, however, said that he accepted it only as a loan, which he intended to repay.* And, it was not disputed that he did repay it in August 1972 with interest.

Based on Van Aken's testimony, the government basically contended--and charged in the indictment--that the money was

*As noted, the $25,000.00 payment was by check which was deposited by Blitz in his bank account, thereby allowing it to be readily traced (GX 15; A. 70). It would appear, therefore, that neither of the parties viewed this payment as illegal at the time it was made.

a pay-off and nothing else. However, perhaps recognizing that the evidence on this issue was, at best, inconclusive, the prosecutor, during trial, contended that even if it was a loan, Blitz' acceptance of the payment violated the statute (A. 79).

The court accepted this latter position in its charge and told the jury that, "...here the government contends and the defendant Blitz denies that when Blitz took the money he knew that Van Aken was trying to sell the stock to the Astron Fund, and if you find that he did and you find that there was a connection between the payment and the sale of Elinvest stock, you may find the defendant Blitz guilty under this count, regardless of whether the payment is labelled as a gift or a payoff or as a loan...." (Emphasis added.) (A. 88).

It is respectfully submitted that by its terms §80a - 17e(1) does not prohibit loans, and that the court's charge to the jury was therefore clearly erroneous insofar as it permitted conviction even if the jury believed Blitz' testimony that the money was a bona fide loan.

Although research has disclosed no case dealing with the question of whether a loan is compensation under the Investment Company Act, there are numerous decisions dealing with this issue in the context of the federal income tax laws.

The Supreme Court of the United States, in an early case, held that the provision of the Revenue Act of 1938 (§22(a))

defining gross income as including "gains, profits and income derived from salaries, wages, or compensation for personal service...of whatever kind and in whatever form paid" was broad enough to include in taxable income any economic or financial benefit conferred on an employee as compensation whatever the form or mode by which it was effected. C.I.R. v. Smith, 324 U.S. 177, 180-81, rehearing denied, 324 U.S. 695 (1945). (Emphasis added.) In Silverman v. C.I.R., 253 F.2d 849, 851 (8th Cir. 1958),the court stated that any economic benefit conferred as compensation was included in gross income for tax purposes, a principle reiterated in C.I.R. v. Mendel, 351 F.2d 580 (4th Cir. 1965), as well as in many other cases. See, e.g., Ward v. C.I.R., 159 F.2d 502 (2d Cir. 1947); Gotcher v. United States, 259 F. Supp. 340 (D.C. Tex. 1966); Painter v. Campbell, 110 F. Supp. 503 (D.C. Tex. 1953).

This definition of the term income is, perhaps, as broad as is constitutionally permissible. Yet, despite its breadth, it has been consistently held that bona fide loans are not income within this definition.

The controlling factor in determining what is and is not income is whether the recipient obtains an economic benefit. Thus, in James v. United States, 366 U.S. 213, 219 (1961), the Supreme Court held that loans are not income because they carry with them a "consensual recognition...of an obligation to repay." See also, Rogan v. Merten, 153 F.2d 937 (9th Cir.

1946); Consolidated-Hammer Dry Plate & Film Co. v. C.I.R., 317 F.2d 829 (7th Cir. 1963); United States v. Rochelle, 384 F.2d 748 (5th Cir. 1967), cert. denied, 390 U.S. 946 (1968).

In United States v. Rosenthal, 470 F.2d 837, 840 (2d Cir. 1972), cert. denied, 412 U.S. 909 (1973), this Court also recognized that "Loans do not ordinarily constitute income," but affirmed the conviction for tax evasion only because the jury could have found that Rosenthal knew he would not be able to, and did not intend to, repay the loans when he received them. (470 F. 2d at 841) In another recent case, the Eighth Circuit went further, holding that receipts from money borrowed did not become "income" taxable to the corporation, notwithstanding that the corporation could not possibly have repaid all the money received by it in the form of loans as a result of the fraudulent scheme. In Re Diversified Brokers, Inc., 487 F.2d 355, 356-58 (8th Cir. 1973).

The doctrine that criminal statutes must be strictly construed was established as early as 1820 in United States v. Wiltberger, 5 Wheat. 76, 96(where Chief Justice Marshall stated that courts are not normally justified in "departing from the plain meaning of words, especially in a penal act,") and has been consistently followed. See, e.g., Bouie v. Columbia, 378 U.S. 347, 362-63 (1964). Thus, "compensation" as used in the instant criminal statute cannot be interpreted more broadly than in other statutes, certainly not tax statutes. Indeed, if

a broader interpretation were given to the term, the statute could no longer be said to give fair warning of the precise acts it outlawed and would thus violate the due process requirements of the Fifth and Fourteenth Amendments to the Constitution. This is not to suggest that loans could not have been specifically forbidden by this statute, but the fact is that they were not.* Therefore, the court's charge to the jury that this statute--despite its language--includes bona fide loans was erroneous and requires reversal of defendant Blitz' conviction.

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*See, e.g., 29 U.S.C. §186 (1947, as amended in 1959) which prohibits an employer from paying, lending or delivering any money or other thing of value to a representative of his employees. In support of its request to charge, re Count 19 (A. 79), the government cited United States v. Roth, 333 F.2d 450 (2d Cir. 1964), cert. denied, 380 U.S. 942 (1965), a case decided under this statute before it was amended to include loans within its prohibitions. Roth, however, is unlike the instant case in that in Roth the defendant received large loans on three occasions without interest. Perhaps more importantly, the court in Roth had charged the jury there that they must find more than a loan in order to find guilt, that it must find that a substantial monetary benefit or thing of value was conferred to constitute a violation of the statute, 333 F.2d at 453.

In its decison affirming the conviction in Roth, the court cited United States v. Carter, 311 F.2d 934 (6th Cir. 1963), where the court held that payment or receipt of bona fide loans was not a crime within the statute and, that the 1959 Amendment was "Congressional recognition that loans had not theretofore been covered." 311 F. 2d at 940. The court in Roth added that whether the loan was bona fide was a question for the jury to decide. In the instant case, the court erroneously failed to instruct the jury to make that decision.

In United States v. Deutsch, 451 F.2d 98 (2d Cir. 1971), cert. denied, 404 U.S. 1019 (1972), this Court held that an opportunity to purchase stock at a discount price--a situtation quite different from that involved here--did constitute compensation under this statute. That decison is completely in accord with income tax cases dealing with the same factual situation: both properly hold that such a purchase does constitute compensation. (See, e.g., United States v. Kirby Lumber Co., 284 U.S. 1, 3 (1931), where the Court held that where a corporation purchased its own bonds at a price less than the issuing price, making a clear gain, the difference did constitute income). Deutsch, however, did not hold that loans are compensation within the meaning of this statute, and nothing in Deutsch requires or even implies such a holding.

The key factor which distinguishes a loan from other forms of payment--including that in Deutsch--is the intent of the parties that the money be repaid. Here there was conflicting testimony as to the parties' intent: the jury may have believed defendant Blitz and found that the $25,000.00--paid by check--was a bona fide loan, or it may have believed Van Aken and found that it was a pay-off. But, under the charge which the court gave the jury, that decision was erroneously precluded because of the court's holding that even a bona fide loan was encompassed by the statute. It is therefore respect-

fully submitted that the judgment against defendant Blitz must be reversed and a new trial ordered so that the jury may determine this issue in accordance with proper instructions.

## POINT THREE

### THE GRAND JURY PROCEDURE HEREIN CONSTITUTED A DENIAL OF DUE PROCESS.

During the trial, defendant Blitz moved for a dismissal of his indictment based on various improprieties in the grand jury procedure relating to the case. At that time, the court decided to postpone a resolution of these issues until after the trial.

In his post trial motion for a judgment of acquittal and a new trial, defendant Blitz again requested a determination of whether either of the grand juries that voted the indictments against him had been improperly extended, cf. United States v. Fein, 504 F. 2d 1170 (2d Cir. 1974), and if so, whether there was sufficient legal evidence before the grand jury to support the superseding indictment. He also sought to determine whether Ned Levitt, Special Strike Force Attorney, had been properly authorized to present the Elinvest case to the grand jury, cf. United States v. Crispino, --F.Supp.-- (S.D.N.Y. 1975), as well as the propriety of his being both interrogator and eventual witness before the grand jury(s). Blitz also questioned whether the testimony he gave in August 1973 to the original grand jury was ever read to the grand jury that voted the instant superseding indictment on December 31, 1974.

In response to these grand jury motions, the government filed an affidavit stating that the original grand jury, empanelled on August 22, 1972, was in fact extended at the time that it voted the first indictment (74 Cr. 798) on August 9, 1974 and conceded that it could not determine whether this extension was made under Rule 6(a) of the Federal Rules of Criminal Procedure or under 18 U.S.C. 3331. It also said that "Testimony which had been presented in connection with Indictment 74 Cr. 798 was read to the grand jury which returned S.74 Cr. 1226)", and that the only "live" witnesses before the second grand jury were Mark and Barry Ross. Nevertheless, the court denied Blitz' motions without either a hearing or an opinion (A. 129-30).

It is respectfully submitted that denial of these motions was unwarranted upon the record as it now stands, and that this Court should at least direct a hearing to resolve these matters relating to the grand jury. These issues include (a) whether sufficient--or indeed any--testimony relating to Blitz was "read" to the superseding grand jury; (b) where Blitz' own prior testimony was read to this grand jury; (c) whether the evidence that was "read" was illegal in view of the apparently improper extension of the first grand jury; and (d) whether there was--ultimately--sufficient legal evidence before the grand jury to support this indictment.

It is respectfully submitted that until these issues are resolved, the instant conviction may not properly be affirmed.

## CONCLUSION

FOR ALL THE ABOVE REASONS, IT IS RESPECTFULLY SUBMITTED THAT DEFENDANT BLITZ' CONVICTION SHOULD BE REVERSED AND A NEW, SEPARATE, TRIAL ORDERED.

Respectfully submitted,

ROONEY & EVANS
521 Fifth Avenue
New York, New York 10017
Tel. No. (212) 682-4343
Attorneys for Defendant-
Appellant Blitz

ELLIOT L. EVANS,
PAUL K. ROONEY,

Of Counsel

August 6, 1975

Received 2 copies of the within
Brief for Appellant Duty
this 6 day of Aug, 1975.

Sign John D. Gordan III

For: Paul J. Curran Esq(s).

Att'ys for Plaintiff Appellee